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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

HAROLD FRANKS AND JOHNNIE LEE, *Petitioners,*

v.

BOWMAN TRANSPORTATION COMPANY, INC., ET AL

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

UNION'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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United Steelworkers of America, AFL-CIO (hereinafter "USWA" or "the Union"), the union-respondent in this case,[1] agrees with petitioners that certiorari should be granted.

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[1] USWA was not the employees' bargaining representative at the time of the events giving rise to this lawsuit, and it is not the union named in the caption. However, the named union-respondent, International Union of District 50, Allied and Technical Workers, merged with USWA in 1972. See, *Brennan* v. *International Union of District 50,* 499 F.2d 1051, 1055 (D.C. Cir., 1974). Accordingly, USWA is now the bargaining representative; and as District 50 no longer has an independent existence, USWA perforce is now the union-respondent herein.

I. CONFLICT AMONG THE CIRCUITS

There is a three-way split among the circuits on the question whether retroactive seniority may be awarded to job applicants who were discriminatorily denied employment after the effective date of Title VII. The Fifth Circuit, in the instant case, held that as a matter of law such relief may not be awarded. The Third Circuit, on the other hand, has held that such relief is *required*. *Jurinko* v. *Edwin L. Weigand Co.*, 477 F.2d 1038, 1046-47 (3rd Cir., 1973), vacated on other grounds, 414 U.S. 971 (1973). The Sixth Circuit, in a decision issued after the decision below, has held that such relief is not precluded as a matter of law, but that the question whether it should be granted is one committed to the equitable discretion of the district court, which must weigh the competing interests militating in favor of and against such relief and consider whether there are other remedial devices which would better accommodate those competing interests. *Meadows* v. *Ford Motor Co.*, 9 FEP Cases 180 (6th Cir., 1975).

In *Meadows*, the Sixth Circuit explained the need for balancing as follows (*Id.* at 188):

> Seniority is a system of job security calling for reduction of work forces in periods of low production by layoff first of those employees with the most recent dates of hire. It is justified among workers by the concept that the older workers in point of service have earned their retention of jobs by the length of prior service for the particular employer. From the employer's point of view, it is justified by the fact that it means retention of the most experienced and presumably most skilled of the work force. Obviously, the grant of fully retroactive seniority would collide with both of these principles.
>
> In addition, where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for determination of layoff would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court.

Based upon these considerations, the Sixth Circuit observed that a grant of retroactive seniority should "not depend solely upon the existence of a record sufficient to justify back pay," i.e., proof that the plaintiff was discriminatorily rejected for employment earlier. Rather, the district court "would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced workforce." The Court thought that reconciling these competing considerations was not "impossible", although it foresaw "genuine difficulties."

II. CLARIFYING THE ISSUE PRESENTED

While we agree that certiorari is warranted, we feel obliged to comment upon certain doctrinal confusions engendered by petitioners' efforts to exaggerate the importance of this case. Petitioners seek to equate the issue herein with one which is quite different, and which has generated its own volume of recent litigation: whether newly-hired minority employees, *who were not themselves discriminated against by their employer,* are entitled to preferred seniority rights over more senior whites because in the past *(usually before the effective date of Title VII)* the employer had pursued a discriminatory hiring policy. The courts have generally concluded (correctly, in our view) that the policies of the Act preclude awarding artificial seniority in this situation. *Local 189, United Papermakers* v. *United States,* 416 F.2d 980, 994-995 (5th Cir., 1969), cert. denied, 397 U.S. 919 (1970); *Waters* v. *Wisconsin Steel Works,* 502 F.2d 1309 (7th Cir., 1974); *Jersey Central Power & Light Co.* v. *Local Unions 327, etc., Electrical Workers,* 9 FEP

Cases 117 (3rd Cir., 1975).[2] These holdings have been premised upon (1) the legislative history indicating that Congress did not intend to interfere with employment seniority rights accumulated prior to the effective date of Title VII,[3] and (2) the legislative decision embodied in Section 703(j), 42 U.S.C. §2000e-2(j) (which may also be a constitional imperative[4]) that Title VII is not to be construed to award preferential treatment to minority employees who were not themselves victims of employment discrimination, simply because the employer in the past discriminated against *other* minority employees and thereby created an "imbalance" (i.e., a disproportionately small percentage of minority employees) in its workforce.

The issue posed in the instant case is quite different, for here the employer engaged in hiring discrimination after the effective date of Title VII, and the plaintiffs are the very victims of that post-Act discrimination. Given the conjunction of these two critical facts, i.e., that the discrimination occurred after the Act became effective, and that seniority relief is sought only for the identifiable victims of that discrimination, neither of the legislative barriers to affording relief recognized in those cases is applicable here.

III. IS THE DECISION BELOW INCORRECT?

We have real doubts as to the correctness of the decision below. Petitioners were discriminated against after the effective date of the Act, and it seems apparent that they should be awarded a remedy which makes them whole. The decision below does not accomplish this. It provides

[2] Contra: *Watkins* v. *United Steelworkers,* 369 F. Supp. 1221 (E.D. La., 1973), pending on appeal to Fifth Circuit as No. 74-2604, argued January 20, 1975.

[3] This legislative history is described in *Local 189, supra,* 416 F.2d at 987, and n.8 thereat.

[4] See, e.g., the issues presented but not resolved in *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

back pay for the period during which employment was denied altogether, but it remits petitioners, without compensation, to an employment future in which their inferior seniority status ("inferior", that is, to the one which they would enjoy had they been hired initially without discrimination) is likely to visit a continuing financial injury (as they fail to obtain promotions, or to hold work during layoffs, which an earlier seniority date would secure for them).

Theoretically, there are two ways in which petitioners could be made whole: (1) they could be awarded the seniority date which they would have received but for the discrimination, or (2) they could be awarded "front pay" which would compensate them for the fact that because they do *not* have the earlier seniority date they may be affected adversely in the future.[5]

The court below thought the first of these remedies precluded by the "bona fide seniority" exception to Title VII, Section 703(h), 29 U.S.C. §2000e-2(h). Whether it was right depends upon a careful assessment of the legislative history of that provision and of the judicial developments to date—matters which we are prepared to discuss fully if certiorari is granted. But assuming the court below *was* right, there is no legislative barrier to the alternative remedy of front pay, and the failure to provide it is not explained in the opinion below. (In fairness to the court below, it should be noted that none of the parties briefed below the issue which this Court is asked to review by certiorari, for it constituted a very minor item in a suit replete with issues of greater practical importance to the parties. The court below announced its holding on this issue without the benefit of the parties' views. Although petitioners thereafter sought

[5] "Front pay" might take either of two forms: a lump-sum payment at the time of judgment (necessarily an estimate), or a judicial direction that if and when future injury occurs compensation will be provided at that time.

rehearing of this holding, the court denied the petition without requesting an answer from appellees, and thus it never had the views of the union and the employer.[6] Ironically, the Sixth Circuit's contrary decision in *Meadows* likewise was rendered without the benefit of briefs from the parties on this issue.)

If, on the other hand, the court below was *wrong* on the 703(h) issue, there still remains the question—upon which the Third and Sixth Circuits are in conflict, *supra* pp. 2-3—whether retroactive seniority should be automatically provided, or whether instead the district court should have discretion to choose between retroactive seniority or front pay depending upon the circumstances of the case.

Finally, the court below apparently did not realize, as the Sixth Circuit did in *Meadows,* that length of service customarily serves a dual function. In addition to serving as a measure of competition between employees, it is also used as the measure for determining an employee's entitlement to fringe benefits (e.g., entitlement to pensions normally depends upon the accumulation of a specified number of years of service). There is no statutory policy which even arguably precludes retroactive investment of length of service for fringe benefit computation purposes. See *Meadows,* 9 FEP Cases at 188.

[6] Rule 40(a), FRAP, provides that "no answer to a petition for rehearing will be received unless requested by the court. . . ."

CONCLUSION

USWA agrees that the Petition for Certiorari should be granted. In view of the distinct possibility that the three parties to this litigation will take three different positions on the merits, USWA suggests that this case not be placed on the summary calendar.

Respectfully submitted,

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